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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUN 17 1991

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re the Application of )

JEFFERY SCOTT )

File No. BPH-910213ME

For Construction Permit for )  
new FM station on Channel 278 )  
at Bethany Beach, Delaware )

File

JUN 19 10 31 AM '91  
AUDIO SERVICES  
DIVISION

To: Chief, Mass Media Bureau

PETITION TO DISMISS OR DENY

EICHER COMMUNICATIONS, INC. ("Eicher"), pursuant to Section 309(d) of the Communications Act of 1934, as amended,<sup>1/</sup> and Section 73.3584 of the Commission's Rules,<sup>2/</sup> hereby petitions that the Chief, Mass Media Bureau, dismiss the above-captioned application of Jeffery Scott ("Scott") as unacceptable for filing.<sup>3/</sup> Substantial and material questions of fact exist that preclude grant of the Scott application. As set forth below, the Commission incorrectly accepted the Scott application for filing. The May 16, 1991 amendment to his application constitutes a "suicide" amendment and should be dismissed. When left to stand on its own, the original application must be dismissed because he has proposed a short-spaced transmitter site, notwithstanding the availability of alternative sites. The Chief should dismiss or deny the Scott application.

<sup>1/</sup> 47 U.S.C. §309(d) (1990).

<sup>2/</sup> 47 C.F.R. §73.3584.

<sup>3/</sup> Eicher's Petition is timely filed. See, Public Notice, Report No. NA-147, released May 13, 1991, which established June 17, 1991 as the deadline for petitions to deny the Scott application.

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FM EXAMINERS

Standing

1. Eicher has standing to request the dismissal or denial of the Scott application. Eicher's President and 100% shareholder, Elaine C. Eicher, is a resident of the proposed service area. Mrs. Eicher maintains a residence at 18 Terrace Road, Rehoboth Beach, Delaware. That residence falls within the service area of the facilities specified in Scott's amended application. See, Application, Exhibit V-B-4, "Proposed Station Coverage;" Amendment, Exhibit V-B-4.

2. As such a potential listener and resident of the service area, Mrs. Eicher has standing to request the dismissal or denial of a broadcast application for a new station. Office of Communications of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1965). Contrast, Coalition for the Preservation of Hispanic Broadcasting v. F.C.C., Case No. 87-1285, April 23, 1991 (D.C. Cir.) (listeners do not have such standing under Section 310(b) of the Act).

3. Attachment 1 to Eicher's Petition is the Declaration of John J. Mullaney, an engineer in the firm of Mullaney Engineering, Inc., Eicher's consulting engineer. In his Declaration, which was made under penalty of perjury, Mr. Mullaney sets forth certain facts which form the factual basis for Eicher's Petition. In addition, facts which form the basis of the Petition are derived from Scott's own representations in his application. These verified facts, as outlined by Mr. Mullaney, as well as the facts contained in the application, of which official notice may be

taken, demonstrate a substantial and material question about whether Scott is technically qualified to be a Commission licensee. 47 U.S.C. §309(d).

Scott's Original Application

4. In his original application, Scott specified a transmitter site at N. Lat. 38-31-45, W. Long. 75-04-50, a site which placed Scott's proposed station 26.2 Km from 2nd Adjacent station WOCQ-FM, Berlin, Maryland. Scott Application, Exhibit V-B-1, page 1. Scott requested a waiver of Section 73.213(c)(1) of the Rules for the short-spacing to WOCQ. Id. However, Eicher proposed a transmitter site at N Lat. 38-34-21, W. Long. 75-06-58, which did not require a waiver.

Scott's Amended Proposal

5. In the May 16th Amendment, Scott proposed to move his proposed transmitter site to the same location specified by Eicher. However, Scott did not request contour protection processing for the Amendment. See, Attachment 2 hereto, which contains a copy of Form 301, Section V-B, Item 13(e) of the Scott Amendment.

6. As set forth in the attached Declaration of Mr. Mullaney, the site specified now by both Scott and Eicher is only 176.5 kilometers from co-channel WGMS-FM, Washington, D.C. Attachment 1, page 1. Section 73.207(a) of the Commission's Rules requires a separation of 178 kilometers. 47 C.F.R. §73.207(a).

7. In his May 16th Amendment, Scott assumes that his application, as now amended, should be processed under Section 73.213(c) of the Commission's Rules because the petition to

allocate Channel 278A to Bethany Beach was filed with the FCC prior to October 2, 1989. (Amendment, Exhibit V-B-1, page 1). As noted in Mr. Mullaney's Declaration, Scott's assumption underlying his position on Section 73.213(c) is incorrect.

8. The Commission has only recently restated its position on grandfathered stations in its Memorandum Opinion and Order in MM Docket No. 88-375, FCC 91-128, released May 30, 1991. At footnote 7 of the MO&O, the Commission stated the following:

"7. In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment."

(Emphasis supplied). Thus, the Commission has clearly reiterated that short-space processing issues must be addressed by each applicant on a station-by-station basis.

9. As Mr. Mullaney notes in his Declaration, the allotment reference point for Channel 278A at Bethany Beach is located at N. Lat. 38-32-22, W. Long. 75-03-20. (Attachment 1, page 2). See also, Report and Order in MM Docket No. 89-498, 5 FCC Rcd 7144 (Pol. and Rul. 1990), at fn. 2. The allotment reference point is located 182.5 kilometers from WGMS and thus clearly exceeds the new separation of 178 kilometers. (Mullaney Declaration, Attachment 1, p. 2). Scott's failure to address this short-

spacing to WGMS, specifically by the kind of contour protection showing provided by Eicher, makes the amendment a defective one.

10. FCC Form 301 specifically requires that an applicant must provide an exhibit to demonstrate that it should be processed under Section 73.215's contour protection procedures. See, Form 301, Section V-B, Item 13(e). See also, FM Broadcast Stations (Short-Spacing Using Contour Protection), 65 RR 2d 1651 (1989). Failure to include such a study makes it impossible to determine from the "four corners" of the application that it can be processed and granted. As such, the Commission treats this as a tenderability defect and will return the application as unacceptable for filing. FM Applications (Tenderability Requirements Applicable to Short-Spaced Proposals), 65 RR 2d 1663 (1989).

11. The Commission will ordinarily allow an applicant to correct such a defective amendment by restoring its original proposal. See generally, Tequesta Television, Inc., 2 FCC Rcd 41, 61 RR 2d 1403 (1987). However, in the case of Scott, the restoration of the status quo ante still dictates dismissal of the application as unacceptable for filing.

12. As noted above, Scott sought a "short-space" waiver in his original application. But Eicher filed a proposal which could comply with all the Commission's short-spacing criteria and processing rules. Moreover, Scott did not provide the necessary concrete support, preferably documentary proof, that suitable non-short-spaced sites were not available. Kenter Broadcasting Co., 62 RR 2d 1573 (1986), aff'd, 62 RR 2d 1579 (D.C. Cir. 1987).

Where, as here, no question exists about the propriety of an opponent's properly spaced site, the Commission will dismiss a short-spaced applicant, such as Scott, and not consider it for further comparative consideration. North Texas Media, Inc. v. F.C.C., 778 F.2d 28 (D.C. Cir. 1985). The Chief should, therefore, dismiss the Scott application.

13. The Chief should dismiss the Scott application. His May 16th amendment was defective for failure to include the necessary request for contour protection processing and should be returned as unacceptable for filing. When forced to rely upon the original site proposal, Scott must fail because he has a short-spaced proposal while his competing applicant, Eicher, has proposed a site in compliance with the Commission's short-spacing rules. The application should be dismissed or denied.

**WHEREFORE**, Eicher respectfully requests that the Chief, Mass Media Bureau, dismiss the Scott application as unacceptable for filing. In the alternative, the application should be denied.

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Respectfully submitted,

**EICHER COMMUNICATIONS, INC.**

By: 

**Stephen Diaz Gavin**  
**BESOZZI & GAVIN**  
1901 L Street, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 293-7405

Its Counsel

Dated: June 17, 1991  
0745/scottdis.mot

**ATTACHMENT 1**



**MULLANEY ENGINEERING, INC.**

9049 SHADY GROVE COURT  
GAITHERSBURG, MD 20877

301 921-0115

**DECLARATION**

I, John J. Mullaney, declare and state that I am a graduate electrical engineer with a B.E.E. and my qualifications are known to the Federal Communications Commission, and that I am an engineer in the firm of Mullaney Engineering, Inc., and that firm has been retained by Eicher Communications, Inc., (FM) to support a petition to dismiss the Application of Jeffery Scott BPH-910213ME for FM Channel 278A at Bethany Beach, Delaware. As will be shown herein, the Scott amendment (910516MD) as well as the original application are both defective in that it creates an impermissible short-spacing in violation of Section 73.207 of the Commission's rules.

On May 16, 1991, Scott filed a change of site amendment in which he proposed the same site as Eicher. The geographic coordinates for that site are: 38-34-21 / 75-06-58. This site is located 176.5 kilometers from WGMS-FM which operates on Ch. 278B at Washington, DC. According to Section 73.207(a), the required separation between co-channel Class A & Class B facilities is 178 KM under the new 6 KW rules. While Eicher requested and submitted the exhibits necessary to permit processing under the Contour Protection section of the rules (73.215), Scott made no such request or submitted the required exhibits. In his amendment, Scott claims that no actual short spacing exists since Scott believes that he is grandfathered under Section 73.213(c)

**DECLARATION OF JOHN J. MULLANEY  
AGAINST JEFFERY SCOTT BPH-910213ME**

**MULLANEY ENGINEERING, INC.**

which requires a separation of only 163 KM (see Scott's engineering statement, pages 1 & 2, "Allocation Study"). However, that belief is incorrect. In the May 30, 1991, Memorandum Opinion and Order in MM Docket 88-375 the Commission re-stated its position on which stations are grandfathered with respect to the old 3 KW rules. Specific attention is called to footnote 7 at the bottom of page 2:

"7. In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rule making to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment."

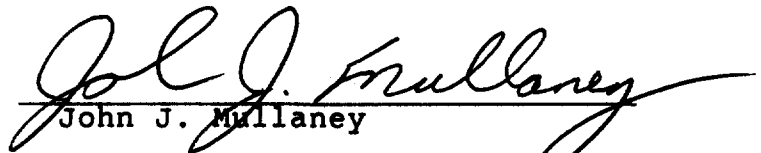
The allotment reference point for Ch. 278A at Bethany Beach is located at: 38-32-22 / 75-03-20. Figure 1 attached hereto is a 6 KW spacing study from the allotment reference coordinates. The allotment reference point is located 182.5 KM from WGMS and, therefore, clearly exceeds the new 6 KW separation of 178 KM. Consequently, it is obvious no grandfathered condition can exist between an applicant for Ch. 278A at Bethany Beach and WGMS. Since the amendment submitted by Scott creates a new impermissible short-spacing and because he does not make the required showing to permit processing under contour protection section of the rules it must be categorized as a "suicide" amendment and defective under the "hard look" processing standards adopted in the Report and Order in MM Docket 84-750.

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**MULLANEY ENGINEERING, INC.**

Assuming that the Commission agrees that Scott's amendment is truly a "suicide" then Scott must now rely on his original application which specified a site located at: 38-31-45 / 75-04-50. Scott's original site was located 26.2 KM from WOCQ which operates on Ch. 280A at Berlin, MD. The required separation between two 2nd adjacent Class A facilities is 27 KM under the old 3 KW rules. By reference to Figure 1 it can be seen that Bethany Beach qualifies for grandfather 3 KW status to WOCQ since the reference point fails to meet the new 6 KW spacing. However, Scott's original site is still short-spaced under the 3 KW rules. While Scott has requested a waiver, it is Commission policy not to grant waivers to the spacing table since the contour protection section of the rules (73.215) was implemented to eliminate such waiver requests. Inasmuch as the original application submitted by Scott creates a new impermissible short-spacing it must be categorized as defective under the "hard look" processing standards adopted in the Report and Order in MM Docket 84-750.

All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

  
John J. Mullaney

Executed on the 15th day of June 1991.

Attachments - Figure 1

\*\*\*\*\* FH CHANNEL STUDY NO. 1 - MULLANEY ENGINEERING, INC. GAITHERSBURG, MARYLAND - 12-JUN-91 09:39:24 \*\*\*\*\*  
 \*\*\*\*\* LAST UPDATE: 910606 \*\*\*\*\*

FCC REF.	27B A	FA	POLARIZATION	ERP (KW)	HAAT	RCANSL
Bethany Beach DE US				HOR PLN	BM TILT	(METER)
38.3222 75.0320 (D.MSS)			HORIZONTAL	6.000	0.000	100.0
			VERTICAL	0.000	0.000	0.0

THE FOLLOWING CONTOURS ARE CALCULATED USING:

CALCULATED HAAT FROM TOPO DATA BASE

ERP= 6.000 (KW) 7.8 (DBK) HAAT= 100.0 (METERS)

INTERFERING	DOMESTIC
	DBU KM
CO CHANNEL ( 40.0)	86.7
1ST ADJACENT ( 54.0)	43.7
2ND ADJACENT ( 80.0)	9.1
3RD ADJACENT (100.0)	2.8
PROTECTED ( 60.0)	28.3
CITY GRADE ( 70.0)	16.2

AZIMUTH	HAAT	HAAT	CONTOURS (KM)	
DEGREES	(METERS)	(FEET)	70 DBU	60 DBU
0.0	100.7	330.4	16.2	28.4
45.0	100.7	330.4	16.2	28.4
90.0	100.7	330.4	16.2	28.4
135.0	100.7	330.4	16.2	28.4
180.0	100.7	330.4	16.2	28.4
225.0	98.3	322.4	16.0	28.1
270.0	97.6	320.1	15.9	28.0
315.0	100.7	330.4	16.2	28.4
AVERAGE	100.0	328.1	16.2	28.3

EST SITE ELEVATION : 0.0 m.; 0.0 ft.  
 EST RAD CENTER AGL : 100.7 m.; 330.4 ft.  
 RAD CENTER A.M.S.L.: 100.7 m.; 330.4 ft.

\*\*\*\*\*

AZIMUTH		LAT		LONG		ERP (KW)		HAAT D	3 KW	6 KW		PROT REZLT	
FROM	TO	CALL	STS	FILE NUMBER	CITY	ST C	(D.MSS)	REL CHN	HORZ VERT	(M) A	RSEP	DIST RSEP	RSEP IR IC
											(KM)	(KM)	(KM)
325.3	145.2	WGMD	LIC	BLH6807	Rehoboth	DE A	38.4205	75.1158	IF 224A	3.00H3.00V	91		21.9 10.
211.2	30.8	WESRFM	LIC	BNLH624	Onley-Ona	VA A	37.4302	75.4101	1ST 277B	50.H 50.V	98	105	106.6 113. S-GF
304.9	124.9	NEW	APP	BPH910213NE	Bethany B	DE A	38.3421	75.0658	CO 278A	3.0H 3.0V	1000		6.4 115. .
**CUT-OFF DATE = 06/17/91 **COMMENT**Amended 910516													
304.9	124.9	NEW	APP	BPH910213NE	Bethany B	DE A	38.3421	75.0658	CO 278A	3.H 3.V	1000		6.4 115. .
**CUT-OFF DATE = 06/17/91													
0.0	0.0	VAC			Bethany B	DE A	38.3222	75.0320	CO 278A	H V			0.0 115. -
**WINDOW CLOSE 02/13/91 **COMMENT**Effective 1-11-91 **DOCKET**89-498 **													
284.6	103.4	WGSFHM	CP	BPH900205IG	Washingto	DC A	38.5609	77.0533	CO 278B	44.H 44.V	158D	163	182.5 178.
284.6	103.4	WGSFHM	LIC	BLH880104KE	Washingto	DC A	38.5609	77.0533	CO 278B	46.H 46.V	155D	163	182.5 178.
**COMMENT**Authorization 9-21-88-Granted Facilities for**DOCKET**84-1166 **													
26.3	206.6	WNGM	LIC	BLH850322KK	Atlantic	NJ A	39.2338	74.3034	1ST 279B	50.H 50.V	106D	105	106.0 113. S-GF
321.5	140.8	WXYC	LIC	BLH900118KD	Havre De	MD A	39.3355	76.0708	1ST 279B	50.H 42.V	104D		146.4 113.
232.6	52.4	WOCQ	LIC	BLH850423KS	Berlin	MD A	38.2258	75.1858	2ND 280A	3.00H3.00V	100	27	28.6 31. S-GF
232.6	52.4	WOCQ	APP	BPH900111IB	Berlin	MD A	38.2258	75.1858	2ND 280A	6.H 6.V	100	27	28.6 31. S-GF

\*\*\*\*\*

S-GF - SHORT SPACED BUT QUALIFIES FOR GRANDFATHERED STATUS UNDER 73.213(C)

MULLANEY ENGINEERING, INC.

FIGURE: 1

**ATTACHMENT 2**

10. Is a directional antenna proposed?

☐ Yes ☒ No

If Yes, attach as an Exhibit a statement with all data specified in 47 C.F.R. Section 73.316, including plot(s) and tabulations of the relative field.

Exhibit No.

11. Will the proposed facility satisfy the requirements of 47 C.F.R. Sections 73.315(a) and (b)?

☒ Yes ☐ No

If No, attach as an Exhibit a request for waiver and justification therefor, including amounts and percentages of population and area that will not receive 816 mV/m service.

Exhibit No.

12. Will the main studio be within the protected 816 mV/m field strength contour of this proposal?

☒ Yes ☐ No

If No, attach as an Exhibit justification pursuant to 47 C.F.R. Section 73.1125.

Exhibit No.

13. (a) Does the proposed facility satisfy the requirements of 47 C.F.R. Section 73.207?

☐ Yes ☒ No

(b) If the answer to (a) is No, does 47 C.F.R. Section 73.213 apply?

☒ Yes ☐ No

(c) If the answer to (b) is Yes, attach as an Exhibit a justification, including a summary of previous waivers.

Exhibit No.  
V-B-1

(d) If the answer to (a) is No and the answer to (b) is No, attach as an Exhibit a statement describing the short spacing(s) and how it or they arose.

Exhibit No.

(e) If authorization pursuant to 47 C.F.R. Section 73.215 is requested, attach as an Exhibit a complete engineering study to establish the lack of prohibited overlap of contours involving affected stations. The engineering study must include the following:

Exhibit No.

- (1) Protected and interfering contours, in all directions (360°), for the proposed operation.
- (2) Protected and interfering contours, over pertinent arcs, of all short-spaced assignments, applications and allotments, including a plot showing each transmitter location, with identifying call letters or file numbers, and indication of whether facility is operating or proposed. For vacant allotments, use the reference coordinates as the transmitter location.
- (3) When necessary to show more detail, an additional allocation study utilizing a map with a larger scale to clearly show prohibited overlap will not occur.
- (4) A scale of kilometers and properly labeled longitude and latitude lines, shown across the entire exhibit(s). Sufficient lines should be shown so that the location of the sites may be verified.
- (5) The official title(s) of the map(s) used in the exhibit(s).

14. Are there: (a) within 60 meters of the proposed antenna, any proposed or authorized FM or TV transmitters, or any nonbroadcast *(except citizens band or amateur)* radio stations; or (b) within the blanketing contour, any established commercial or government receiving stations, cable head-end facilities, or populated areas; or (c) within ten (10) kilometers of the proposed antenna, any proposed or authorized FM or TV transmitters which may produce receiver-induced intermodulation interference?

☒ Yes ☐ No

If Yes, attach as an Exhibit a description of any expected, undesired effects of operations and remedial steps to be pursued if necessary, and a statement accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence or authorized or to radio receivers in use prior to grant of this application. *(See 47 C.F.R. Sections 73.315(b), 73.316(e) and 73.318.)*

Exhibit No.  
V-B-5

**CERTIFICATE OF SERVICE**

I, Lisa Taylor, a secretary in the law firm of Besozzi & Gavin, do hereby certify that I have, on this 17th day of June, 1991, sent the foregoing "PETITION TO DISMISS OR DENY" by U.S. mail, first class, postage-prepaid, to the following:

Dennis P. Corbett, Esquire  
Leventhal Senter & Lerman  
2000 K Street, N.W. Suite 600  
Washington, D.C. 20006  
Counsel to Jeffery Scott

  
\_\_\_\_\_  
Lisa Taylor